OPEN SESAME:
OPEN RECORDS IN THE LEGISLATURE

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TEXAS LEGISLATIVE COUNCIL
EVERY STATE HAS ONE

- Usually apply to the Legislature
  - A few exclude the legislature by virtue of State Constitutional provisions regarding Legislative Rules
FOIA OR OPEN RECORDS ACT

- **TIME TO RESPOND IS VERY SHORT**
  - Often 5 to 10 Days
  - Failure may bring waiver of right to withhold or even civil or criminal penalties

- **Burden is Usually on Governmental Body to**
  - Provide copies or make records available for inspection or
  - State basis for withholding to requestor or to proper authority such as attorney general
If You Are a Legislative Service Agency…

- **Determine What Records You Retain:**
  - For your own use
  - On behalf of a legislator, committee, or other office

- **For Records Maintained for Another Office:**
  - Take reasonable steps to notify affected office that records have been requested
  - Let office for which information is retained control decision-making regarding those records
BALANCING ACT:
DUTY TO DISCLOSE vs. BREACH OF CONFIDENTIALITY

- If information is confidential, disclosure may be:
  - Unlawful
  - A Violation of Agency or Office Policy
  - Be a Breach of Professional Duty

- If confidentiality may be waived, determine who may make that determination
PLAN AHEAD!

- MAINTAIN RECORDS IN ACCORDANCE WITH LAW AND RETENTION POLICIES
  - Absence of requested records can create impression of destruction or loss of records
  - Disorganized files may lead to inadvertent disclosure
PLAN AHEAD!

- ASSUME RECORDS WILL BE DISCLOSED:
  - Through open records request
  - Through litigation
  - Through leaks
  - Through mistakes

- ASSUME DOJ WILL SEE THEM
PLAN AHEAD!

- KEEP RECORDS CLEAN:
  - Avoid disparaging or embarrassing remarks and entries
  - Consider how info could be used to suggest unlawful motives that were not present:
    - Racial purpose (e.g. “Maxblack” plan)
    - Partisan (e.g. “Kill Bill”)
PLAN AHEAD!

- KEEP RECORDS ORGANIZED:
  - Time is short when open records request is received
  - Change of personnel can lead to lost files, confusion, uncertainty
PLAN AHEAD!

- CONSULT LEGAL COUNSEL
  - IN HOUSE OR ATTORNEY GENERAL
- LEARN THE PROPER PROCEDURES TO COMPLY OR CLAIM EXCEPTIONS
PLAN AHEAD!

- Identify Counsel to Assist if Open Records Request Received
  - Identify applicable exceptions in advance
  - Maintain Records Accordingly:
    - AVOID WAIVER
PLAN AHEAD!

- **LEGAL COUNSEL AND SUPPORT AGENCIES:**
  - Identify Exceptions that May be Claimed
  - Counsel Clients What to do if Open Records Request is Received
PLAN AHEAD!

- LEGAL COUNSEL:
  - Statutory exceptions may be unclear or inadequate, law undeveloped
  - Example: Legislative Privilege not recognized by Texas AG
  - Be Prepared to be Creative to Serve Your Client
SUPPORT AGENCIES:
Minimize Requests by Posting Information On The Internet

- Hearing schedules, minutes, witness submissions
- Redistricting plans and amendments that are not confidential
- Court pleadings, proposals, plans, orders
- Election and Census Data
WAIVER

- CLAIM TO CONFIDENTIALITY MAY BE WAIVED OR VOIDED BY DISCLOSURE:
  - To Press
  - To Constituents
  - To Lobbyist
  - To non-government personnel outside the legislator’s office – Att’y for NGO, Political Consultant, Party Official, etc.
COMMON EXCEPTIONS FROM PUBLIC DISCLOSURE

- DELIBERATIVE EXCEPTIONS:
  - May Include DRAFTS AND REDISTRICTING PLANS (unless filed or made public)
  - Policy Memos, Analysis of Plans
  - Recommendations for plans, legislative strategy
  - Drafts of speeches, talking points

- CORRESPONDENCE WITH LEGISLATOR
COMMON EXCEPTIONS FROM PUBLIC DISCLOSURE

- LEGISLATIVE WORKING PAPERS (Including Redistricting Plans)

- INFO PRIVILEGED UNDER OTHER LAW:
  - Attorney-Client Privilege
  - Legislative Privilege?
Gov’t Code Sec. 552.106. EXCEPTION: CERTAIN LEGISLATIVE DOCUMENTS.

(a) A draft or working paper involved in the preparation of proposed legislation is excepted from the requirements of Section 552.021.

- NOT a rule of confidentiality – May be Waived
Gov't Code Sec. 306.003. CONFIDENTIAL RECORDS. (a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential.
OREGON

- 192.502 Other public records exempt from disclosure. The following public records are exempt from disclosure.

  - (9)(a) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.
§ 2.2-3705.7. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law: . . .

2. Working papers and correspondence of the . . . Lieutenant Governor; . . . the members of the General Assembly or the Division of Legislative Services . . . .
§ 25-61-17. Chapter not to affect legislature.

Nothing in this chapter shall be construed as denying the legislature the right to determine the rules of its own proceedings and to regulate public access to its records.
[Personnel of the Office of the Revisor of Statutes] may not reveal to any person not employed by the revisor's office the content or nature of a request for drafting services. The content of the request and documents and communications relating to the drafting service supplied is not public and is not subject to subpoena, search warrant, deposition, writ of mandamus, interrogatory, or other disclosure.
(a) All books, papers, records, and correspondence of the office of legal services pertaining to its work . . . are public records except:

(1) Intraoffice memoranda made by the director of the office of legal services or the director's staff; and

(2) Work papers and correspondence, including correspondence by electronic mail, with any person receiving service from the office of legal services.
§ 50-18-72. (a) Public disclosure shall not be required for records that are:

(8) Related to the provision of staff services to individual members of the General Assembly by the Legislative and Congressional Reapportionment Office, the Senate Research Office, or the House Research Office . . . .
Sec. 708. ... The following are exempt from access…
(10) (i) A record that reflects:
(A) The internal, predecisional deliberations of an agency, its members, employees or officials . . . including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment . . .
(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.
IC 5-14-3-4 (b) . . . the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

- (13) The work product of the legislative services agency under personnel rules approved by the legislative council.

- (14) The work product of individual members and the partisan staffs of the general assembly.
WHAT TO DO WHEN REQUEST IS RECEIVED

1. Get clear picture of what is being requested.
   - Read Request Carefully

2. Act immediately – Identify Deadline to respond or claim exceptions
   - More time available to locate and prepare records
   - More time to identify exceptions
WHAT TO DO WHEN REQUEST IS RECEIVED

3. Identify Information in Possession of Office That Fairly Falls Within Request
   - Computer search may be necessary
   - Survey all staff members who may have any records or know of any
   - Make copies or inventory
   - Raw data on back-up tapes MAY NOT be considered public information in possession of your office (State law varies)
WHAT TO DO WHEN REQUEST IS RECEIVED

4. Do Not Create New Info
   - Research Not Usually Required
   - Programming or Reformatting MAY BE REQUIRED

5. Get Legislator to Determine What She Considers Important to Keep Confidential
   - DON’T PROMISE ANYTHING
   - CONSIDER DISCLOSURE ANYWAY
     - Frequently Harm is Exaggerated or Imagined
WHAT TO DO WHEN REQUEST IS RECEIVED

6. Identify Information That MUST Be withheld as Legally CONFIDENTIAL

- Varies widely from state to state
  - Social Security Numbers
  - Home addresses or phone numbers
  - Trade Secrets
  - Attorney’s Client Files (Client May Waive)
WHAT TO DO WHEN REQUEST IS RECEIVED

7. Determine whether there is a basis to withhold NON-CONFIDENTIAL INFO that your office considers sensitive

- Consider Political (Non-Legal) Ramifications of Claiming Exceptions
- Who is the Requestor? News Media, Political Opposition, Disgruntled Constituent, etc.
Speech or Debate Clause: *In Re Perry*, 60 S.W.3d 857 (Tex. 2001)

The plaintiffs sought to depose three board members and their chief legislative aides... The deposition notices seek documents and testimony regarding all data entries, plans, partial plans and calculations performed on or in connection with the State of Texas “Red Apple” redistricting system/program, that relate to [sic] any manner to the consideration of and/or formulation of redistricting plans...
“[T]he Speech or Debate Clause stands as an insuperable obstacle to [a party’s] attempt to acquire by compulsion documents or copies of documents in the possession of the Congress.”

HOWEVER...

The TEXAS Attorney General has determined that material that is privileged under the *In re Perry* Speech or Debate Clause doctrine REMAINS SUBJECT TO REQUIRED DISCLOSURE UNDER THE TEXAS OPEN RECORDS LAW

- -- OR 2007-15028
- -- NO JUDICIAL DECISIONS